

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK----- x
SALVATORE COSTA,

Plaintiff,

-against-

07 Civ. 8032 (LAK)

THE CITY OF NEW YORK, et al.,

Defendants.

----- x

ORDERLEWIS A. KAPLAN, *District Judge*.

Plaintiff, a retired New York City police lieutenant, claims here that he gave a summons to someone who turned out to be a friend of defendant Chief Joe Fox and that Fox retaliated against him in ways that forced him to retire. He claims that these actions violated his right to equal protection of the laws. Defendants move to dismiss the complaint for failure to state a claim upon which relief may be granted. Fox seeks dismissal also on the ground of qualified immunity.

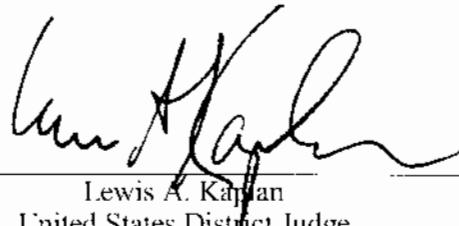
Plaintiff's constitutional claim rests on *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), in which the Supreme Court held that the Equal Protection Clause may be offended where a state actor treats an individual differently than other similarly situated persons without any rational basis for doing so. Defendants correctly argue that the complaint lacks any allegation that plaintiff was treated differently than other similarly situated and that it therefore fails to state a claim upon which relief may be granted. There is no reason, however, why plaintiff should not be afforded an opportunity to cure this deficiency by amendment.

In view of the dismissal of the complaint, there is no reason to reach the qualified immunity contention. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The appropriate time at which to do so would be after any amended complaint is sustained, assuming that transpires.

Accordingly, the motion to dismiss the complaint for failure to state a claim upon which relief may be granted is granted with leave to amend. Any amended complaint shall be filed no later than December 12, 2007.

SO ORDERED.

Dated: November 28, 2007



Lewis A. Kaplan
United States District Judge

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